

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35981

FINCH PAPER LLC—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision, on appeal of a discovery order of an Administrative Law Judge at the Federal Energy Regulatory Commission (FERC), clarifies the Board's regulations with respect to appeals and remands the matter to FERC.

Decided: January 11, 2017

On September 13, 2016, Delaware and Hudson Railroad, d/b/a CP Rail (CP Rail), appealed the August 24, 2016 "Order of Administrative Law Judge on Motion to Compel Discovery Responses," issued by an Administrative Law Judge (ALJ) at the Federal Energy Regulatory Commission (FERC), which granted, in its entirety, a motion to compel discovery filed by Finch Paper LLC (Finch Paper). The Board is remanding this matter to FERC, for the reasons discussed below.

BACKGROUND

By petition filed on December 7, 2015, Finch Paper seeks a declaratory order from the Board that certain practices and actions by CP Rail relating to CP Rail's assessment of demurrage charges against Finch Paper are unreasonable practices in violation of 49 U.S.C. §§ 10702 and 10746 and that CP Rail has violated its common carrier obligation under 49 U.S.C. § 11101.² By a decision served on February 11, 2016, the Board instituted a declaratory order proceeding and established a procedural schedule for the completion of discovery and the submission of evidence.

As relevant here, Finch Paper served CP Rail with two sets of discovery requests, its first on February 18, 2016, and its second on April 11, 2016. Among its first set of discovery requests, Finch Paper included Document Request Nos. 30 and 34, which sought, respectively,

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² This matter was referred to the Board by the United States District Court for the Northern District of New York on November 10, 2015, in Delaware & Hudson Railway v. Finch Paper LLC, No. 1:15-cv-00417-TJM-TWD.

documents pertaining to notices or enforcement actions by the Federal Railroad Administration (FRA) and to CP Rail's Customer Audit Safety forms.³ Among its second set of discovery requests, Finch Paper included Interrogatory Nos. 15, 16, 17, 18, and 19, and Document Request Nos. 40, 41, 42, and 44, which sought information and documents pertaining to business plans that called for reducing employees and locomotives, employee terminations, reallocation of crews and locomotives, changes to the customer service department, and prior service issues.

CP Rail objected to these requests. (See Finch Paper Mot. to Compel at Ex. A.) On July 1, 2016, Finch Paper filed with the Board a motion to compel discovery related to these requests. As to the first set of discovery requests, Finch Paper argues that its requests are narrowly defined, not burdensome, and relevant to the proceeding because they seek information related to determining whether delays in picking up or delivering rail cars, and the demurrage charges levied, were related to safety and FRA compliance issues. (See Finch Paper Mot. to Compel at 4-5.) As to the second set of discovery requests, Finch Paper asserts that the discovery sought is specific and related to whether CP Rail's reductions in the number of its employees, including train crews, adversely impacted CP Rail's ability to satisfy its service obligations to Finch Paper. (Id.) Finch Paper also contends that CP Rail's decision to cut back on locomotives and railcars is directly relevant to the issue of whether CP Rail violated its common carrier obligations under 49 U.S.C. § 11101. (Id. at 8-9.)

On July 21, 2016, CP Rail opposed Finch Paper's motion. CP Rail argued that Finch Paper's motion to compel should be denied in its entirety because it was untimely. As to the merits of the motion, CP Rail claimed that the documents sought are irrelevant, that the requests are overly broad and unduly burdensome, and that the discovery sought would require it to conduct a special study. (See CP Rail Reply Mot. to Compel at 2.) Finch Paper and CP Rail also filed surreplies, on August 3 and August 8, 2016, respectively.

On August 16, 2016, the Board, through the Director of the Office of Proceedings, accepted Finch Paper's July 1, 2016 motion to compel over CP Rail's objections that it was untimely, noting that CP Rail continued to produce responsive documents as late as June 30, 2016. That decision also accepted Finch Paper's and CP Rail's surreplies. The Board then referred Finch Paper's motion to compel to an Administrative Law Judge (ALJ) at the Federal Energy Regulatory Commission (FERC), pursuant to the Board's and FERC's Memorandum of Understanding (MOU) authorizing the Board to refer certain matters to FERC ALJs for resolution. See Finch Paper LLC—Pet. for Declaratory Order, FD 35981, slip op. at 1 (STB served Aug. 16, 2016).

On August 24, 2016, the ALJ granted Finch Paper's motion to compel in its entirety. The ALJ found that the motion was not untimely based on the Board's referral order. See Finch

³ According to CP Rail, these are forms that it uses to document its safety inspections of its customers' track facilities. (CP Rail Reply to Mot. to Compel at 6.)

Paper LLC—Pet. for Declaratory Order, FD 35891, slip op. at 1 (STB served Aug. 24, 2016). The ALJ then explained that Finch Paper “may request from CP [Rail] any information or document(s) having any tendency to make any fact of consequence to the Board’s final determination in the proceeding more or less probable than it would be without the information or document(s).” The ALJ found that Finch Paper’s requests met this standard. (See id.) Additionally, the ALJ determined, after review of the discovery requests, that there was no need for CP Rail to conduct any special study in order to respond. (Id.)

On September 13, 2016, CP Rail appealed the ALJ’s ruling to the entire Board, citing 49 C.F.R. § 1115.2. CP Rail argues that the August 24, 2016 ALJ decision meets all of the § 1115.2(b) criteria and should be reversed because: (1) there was no hearing or conference held on the motion (see CP Rail Appeal at 2); (2) the ALJ’s decision provides no explanation as to how the discovery requests are relevant or how this information would assist the Board in deciding the issues before it (see id. at 3-9); and (3) the ALJ’s decision does not address CP Rail’s arguments as to the unduly burdensome nature of Finch Paper’s discovery requests (see id. at 10-12).

Finch Paper filed a reply in opposition to CP Rail’s appeal on September 16, 2016. Finch Paper asserts that CP Rail’s appeal is untimely because CP Rail incorrectly appealed under § 1115.2, which has a 20-day filing deadline, when instead, CP Rail’s appeal should have been filed under either 49 C.F.R. § 1115.1 (10-day deadline) or 49 C.F.R. § 1115.9 (7-day deadline) (see Finch Paper Reply at 2-3), in which case CP Rail’s appeal was late. Finch Paper further argues that CP Rail’s appeal does not meet the standard of review under either § 1115.1 or § 1115.9 (see id. at 4-5, 8-10), and that the discovery sought by Finch Paper is relevant, as determined by the ALJ (see id. at 6-8).

On September 19, 2016, CP Rail filed a letter-response to Finch Paper’s reply in opposition to the appeal. CP Rail argues that, even if its appeal is deemed to be untimely, accepting it will not prejudice Finch Paper, and that its appeal meets the standards of either § 1115.1(c) or § 1115.9(b) because the ALJ’s decision contains a clear error of judgment that resulted in manifest injustice. (See CP Rail Letter at 2).⁴

On September 27, 2016, Finch Paper filed a motion to hold the procedural schedule in abeyance pending final resolution of CP Rail’s appeal. CP Rail filed a reply in opposition to Finch Paper’s motion on September 29, 2016. By a decision served on October 6, 2016, the Board granted the motion to hold the procedural schedule in abeyance while the Board considered CP Rail’s appeal.

⁴ CP Rail’s letter is a reply to a reply. In the interest of compiling a more complete record, we will accept CP Rail’s letter. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply “[i]n the interest of compiling a full record”).

DISCUSSION AND CONCLUSIONS

The parties disagree on the appropriate regulation under which the appeal at issue should have been filed, and thus the appropriate filing deadlines and standards. CP Rail argues that an appeal of the ALJ order should be decided under § 1115.2. Finch Paper argues that CP Rail's appeal should have been filed under either § 1115.1 or § 1115.9. (Finch Paper Reply at 1.) The Board's standard for appeals of decisions on matters such as a motion to compel discovery is, based on Board precedent, unclear. This decision clarifies the Board's regulations and procedures for interlocutory appeals of decisions by ALJs (or by Board staff) on discovery.

CP Rail's reliance on § 1115.2 as the standard for appeals of the FERC ALJ's order is misplaced. Section 1115.2, titled "Initial Decisions," pertains to "initial decision[s] of an administrative law judge, individual Board Member, or employee board." However, CP Rail's appeal is not of an "initial decision." In the context of § 1115.2, an "initial decision" means an initial decision on the merits by an ALJ—a procedural practice that the agency no longer utilizes.⁵ Because a ruling by a FERC ALJ on a discovery issue is not a determination on the merits, such a ruling is not an initial decision under § 1115.2. Thus, the § 1115.2(e) standards related to such appeals are not applicable to CP Rail's motion.

In contrast, Finch Paper argues that CP Rail's appeal should have been filed under either § 1115.1 or § 1115.9, though it notes some "uncertainty" as to which is the appropriate regulation. (Finch Paper Reply at 1.) Section 1115.1, titled "Scope of Rule," states in relevant part as follows:

Appeals from the decisions of employees acting under authority delegated to them by the Chairman of the Board pursuant to [49 C.F.R.] § 1011.6 will be acted upon by the entire Board. Appeals must be filed within 10 days of the date of the action taken by the employee, and responses to appeals must be filed within 10 days thereafter. Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.

49 C.F.R. § 1115.1(c).⁶ Section 1115.9, titled "Interlocutory Appeals," states in relevant part as follows:

⁵ The Board's Rules of Practice, which include 49 C.F.R. Part 1115—Appellate Procedures, were adopted when the agency's predecessor used its own ALJs and individual agency members and employee boards to issue initial decisions on the merits. It is to these sorts of decisions that § 1115.2 was directed.

⁶ This appeal standard mirrors that found in § 1011.6(b), which is cited in the MOU.

Rulings of Board employees, including administrative law judges, may be appealed prior to service of the initial decision⁷ only if:

- (1) The ruling denies or terminates any person's participation;
- (2) The ruling grants a request for the inspection of documents not ordinarily available for public inspection;
- (3) The ruling overrules an objection based on privilege, the result of which is to require the presentation of testimony or documents; or
- (4) The ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.

49 C.F.R. § 1115.9(a).

As the parties note, the Board has cited both § 1115.1 and § 1115.9 in its decisions resolving appeals of discovery rulings.⁸ The Board clarifies here that, going forward, it will read these two regulations in conjunction as a two-part standard for interlocutory appeals, as follows. An interlocutory appeal is an appeal prior to a final Board decision on the merits of a proceeding. Under § 1115.9(a), a Board employee's ruling on discovery (including an ALJ's ruling) may be appealed on an interlocutory basis only if it meets one of the four enumerated circumstances (regarding party participation; document inspection; privilege; or irreparable harm, prejudice, or detriment to the public interest). Thus, § 1115.9(a) is a threshold determination concerning whether the decision is of a type that is subject to an interlocutory appeal. If the § 1115.9(a) threshold is satisfied and the ruling can be appealed prior to a final Board decision, the merits of the appeal are analyzed under the standard outlined in § 1115.1(c).⁹ Although appeals are

⁷ The provisions of § 1115.9, like those of § 1115.2, refer to initial decisions. However, when each section is read in its broader context, it is clear that the entire focus of § 1115.2 is on how substantively to appeal an initial merits decision by an ALJ or other agency employee (which, as noted, no longer exist), while the focus of § 1115.9 is on interlocutory appeals, i.e., appeals of preliminary decisions not on the merits. Therefore, we conclude that despite the use of the term "initial decision," § 1115.9 was intended to focus on interlocutory appeals of preliminary rulings.

⁸ In revising the appellate procedures in 1996, the agency indicated that appeals from rulings on discovery would be governed by § 1115.9, although the Board also cited to § 1115.1. Expedited Procedures for Processing Rail Rate Reasonableness, Exemption & Revocation Proceedings, 1 S.T.B. 754, 768-70 (1996).

⁹ We note that § 1115.1(a) provides that abandonments and discontinuances are governed by the appellate procedures at 49 C.F.R. Part 1152. However, those regulations apply to substantive decisions on the merits in abandonment and discontinuance cases, in which there typically is no discovery. See 49 C.F.R. § 1152.25(e)(2). The Board clarifies that, notwithstanding § 1115.1(a), appeals of discovery decisions in abandonments, to the extent

(continued . . .)

sometimes granted, under that standard, such appeals “are not favored,” and “will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.” Id.

In this instance, CP Rail appeals an order of a FERC ALJ, who works for the Board by virtue of 5 U.S.C. § 3344, and who has been delegated authority by the Chairman of the Board under 49 C.F.R. § 1011.6, to resolve discovery disputes such as this one. The appeal at issue here is thus interlocutory (not an appeal of an initial decision on the merits), and as such, is governed at the outset by the threshold established in § 1115.9. If the appeal falls into one of the § 1115.9 categories, then the Board can consider whether the FERC ALJ’s decision meets the appellate standard of § 1115.1.

Here, CP Rail’s appeal, which was filed under the incorrect regulation, was technically untimely.¹⁰ However, in light of our clarification of the rules that apply to appeals, we will waive our filing deadline and accept the appeal for filing.

As previously noted, the Board and FERC, pursuant to 5 U.S.C. § 3344 and 31 U.S.C. § 1535, have a MOU authorizing the Board to refer certain matters to FERC ALJs for resolution, and the discovery motion at issue here was referred to the ALJ pursuant to this MOU. Under Section 1 of the MOU, the ALJ is to “provide a written decision of sufficient clarity and detail to the STB so that the STB can adjudicate any appeal.” In deciding an appeal, the Board must, as an initial matter, understand the basis for the ALJ’s ruling. Here, however, although the ALJ did cite the familiar standard for discovery—that it could lead to information that could be relevant to a decision on the merits—we cannot sufficiently discern the basis for the ALJ’s ruling based on the level of detail contained in the written decision. Therefore, we will return the matter to FERC for a further decision (with or without hearings, as deemed appropriate). Accordingly, although we have accepted CP Rail’s appeal for filing, we will deny it as moot in light of our ruling. Any party aggrieved after a further decision on remand may appeal under the procedures described above. In the meantime, the Board encourages the parties to make a good faith effort to resolve this discovery dispute.

(continued . . .)

discovery may occur, will be governed by the same rules and standards that apply to other discovery appeals.

¹⁰ See § 1115.9(b) (“[i]n all other cases [aside from rate cases], interlocutory appeals shall be filed with the Board within seven (7) calendar days”).

It is ordered:

1. CP Rail's appeal and letter dated September 19, 2016, are accepted for filing.
2. This matter is remanded to FERC, as described above, and CP Rail's appeal is denied as moot.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.